SUPERIOR COURT
OF THE
STATE OF DELAWARE

T. HENLEY GRAVES
RESIDENT JUDGE

SUSSEX COUNTY COURTHOUSE
ONE THE CIRCLE, SUITE 2
GEORGETOWN, DE 19947

June 29, 2005

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RE: State v. Albert Johnson
Defendant ID No. 0411007637

Date Submitted: April 25, 2005

Dear Counsel:

The defense has filed a Motion to Suppress two statements made by Defendant and if suppressed, to not permit the statements to be used for impeachment in the event Defendant testifies. The defense also seeks to disqualify the prosecutor from continuing to handle the case.

The disqualification application is now moot because another prosecutor, James Adkins, has taken the case and the relief sought by the defense has occurred without a ruling by the Court.

The Court had the benefit of an evidentiary hearing on April 20, 2005 and oral argument on April 25, 2005. This is the Court's decision concerning the suppression issues.

Timeline

To better understand the events, the State provided a timeline in its brief. I've found it helpful and incorporate parts of it here to help explain the factual background.

July 2003	Burglary (Didonna). Defendant arrested, engages the Public Defender's Office and waives preliminary hearing.
Aug. 19-21, 2003	Burglary (Jean Croft). A bike is taken.
Aug. 25, 2003	Defendant arrested in Croft burglary. Defendant is Mirandized and gives a statement as to the Croft burglary.
Sept. 11, 2003	Information filed on the Didonna burglary.
October 15, 2003	Information filed on the Croft burglary.
October 20, 2003	Burglary (Tharp).
October 22, 2003	Alleged rape, burglary and robbery of Ms. Croft by Defendant.
October 23, 2003	Defendant arrested by Delaware State Police on capias and fresh warrants.
October 24, 2003	As to Croft alleged rape, Defendant gives statement and a blood sample for DNA analysis. Defendant denies the rape.
November 17, 2003	Defendant pleads guilty to three counts of burglary 3rd (Didonna, Croft and Tharp); Defendant sentenced to Level 5 Key followed by Crest.
October 27, 2004	Ms. Croft dies.

November 4, 2004	DNA analysis returned providing a positive "hit" as to Defendant's DNA (i.e., forensic evidence allegedly connecting Defendant to the alleged rape of Ms. Croft).
November 15, 2004	Grand Jury indicts Defendant for the rape, burglary and robbery offenses (Croft).
November 17, 2004	Prosecutor and police interview the Defendant (Croft rape, etc.). Defendant reports consensual sex.

The 2003 October Interview

At the time of this interview, Defendant was represented by the Public Defender's Office on at least two burglaries and other property crimes. The Sixth Amendment right to counsel had attached to these charges. The interview was conducted by a Rehoboth Beach detective, who told Defendant that he was seeking information about open or unsolved burglaries. At one point, the discussion touched upon the pending burglary charges against Defendant. Then, at the end of the interview, the Detective asked Defendant about the Croft rape. In response, Defendant denied having any contact with Ms. Croft.

The defense seeks to have the entire interview suppressed because, despite the statement's exculpatory nature, his denial of any contact with Mrs. Croft is contradicted by the DNA evidence supporting sexual relations between them. The admission of the interview may harm Defendant's credibility. The defense claims that the violation of Defendant's Sixth Amendment right to counsel for the charged burglaries taints the entire interview, including the discussion of unsolved burglaries and the rape, to which the Sixth Amendment right to counsel had not yet attached.

The State argues that the attachment of the Sixth Amendment right to counsel to the previously charged burglaries does not affect or apply to the discussion of unsolved and uncharged crimes because the crimes and coinciding rights to counsel are severable.

The protections in the Sixth Amendment provide that in "all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defence." U.S. CONST. amend. VI. States are required to guarantee the protections of the Sixth Amendment to their citizens by operation of the Fourteenth Amendment. *See Gideon v. Wainwright*, 372 U.S. 335, 342-43 (1963). The right to counsel provided by the Sixth Amendment attaches when adversarial judicial proceedings are commenced against a defendant and remains throughout all critical stages of the proceedings. *See Kirby v. Illinois*, 406 U.S. 682, 689 (1972). The right attaches to initial proceedings, including formal charges, preliminary hearings, indictments, bills of information and arraignments. *Id*. The right also applies to post-indictment interviews. *Massiah v. United States*, 377 U.S. 201, 206 (1964).

But, the Sixth Amendment right to counsel is offense specific. *See McNeil v. Wisconsin*, 501 U.S. 171 (1991). Therefore, if the Sixth Amendment right attaches to one charge, it cannot be used by a defendant to prevent police interrogation into other crimes in which he is merely a suspect. *Id*. Otherwise, the right would unduly frustrate the public's interest in the investigation of other criminal activities, which may require law enforcement to speak to a defendant indicted under other charges. *See Maine v. Moulton*, 474 U.S. 159, 179-80 (1985); *Jackson v. State*, 643 A.2d 1360, 1372 (Del. 1994). Rather, the Sixth Amendment protects an accused with the right of counsel only for charges that have been officially commenced against him, but may not be used to chill investigatory efforts in a separate criminal investigation.

In his first interview with Defendant, a Rehoboth detective discussed the details of a burglary charge, on which Defendant had been indicted and which implicated his Sixth Amendment right to counsel. In the same interview, the detective asked questions relating to a number of unsolved burglaries and the Croft rape, which were not covered by Sixth Amendment protections. Defendant spent most of the interview rambling and providing exculpatory evidence for various burglaries. In fact, there is very little, if anything, that could be considered overtly inculpatory to any crime in the October 23, 2003 interview. Nonetheless, the defense contends that the Sixth Amendment violation as to the indicted burglary charge effectively taints the entire interview and that statements by Defendant concerning the Croft rape should be excluded from evidence. I do not agree.

In *Alston v. State*, the Delaware Supreme Court held that "[a] violation of a defendant's Sixth Amendment right to counsel does not blanketly preclude the admissibility of all information thereafter given." *See* 554 A. 2d 304, 309 (Del. 1989). In that case, a defendant was indicted on robbery charges. *Id*. at 307. The following day, he was taken to the police station and interrogated, without the assistance of counsel, about the indicted charges as well as additional robbery and conspiracy charges. *Id*. The defendant gave an inculpatory statement. *Id*. He later sought the suppression of the statement, claiming that the Sixth Amendment violation applied to the entire statement and that it should be excluded from state's evidence. *Id*. at 309. The Court disagreed, holding that since no formal charges had been processed against the defendant in the unindicted robbery and conspiracy crimes, the Sixth Amendment did not apply to the portions of the statement discussing those crimes. The Court held that the portions of the statement not covered by the Sixth Amendment were admissible in a trial for those crimes. *Id*.

Because the Sixth Amendment right to counsel is offense specific, its violation should be tied only to the charge to which the right applies. Here, the Sixth Amendment violation implicates only the burglary charges on which Defendant was being represented. The exclusionary rule may preclude use of the statement in a criminal proceeding against Johnson for the indicted burglary, for which he had been appointed counsel. But the rape charges were initiated after the date of the October 2003 interview. Therefore, the portions of the interview relating to the rape and other burglaries were not covered by the Sixth Amendment at that time and are admissible against Defendant in these proceedings so long as the statements were voluntary.

There has been no attack on the voluntariness of the statement and nothing in the evidentiary hearing or videotape suggests anything but a voluntary statement was given by Defendant. The portions of Mr. Johnson's statement that violate his Sixth Amendment right to counsel on the indicted burglary charge are easily severed from the portions of the statement relating to the rape investigation, which does not implicate the Sixth Amendment. The October statement is therefore admissible, subject to its redaction.

The November 2004 Interview

The Rehoboth Beach police learned of DNA evidence confirming sexual activity between Defendant and Mrs. Croft on November 4, 2004. At this point, a Deputy Attorney General became actively involved in the case. Defendant was indicted on November 15, 2004. Knowing the complaining witness had died (she was 79 at the time of the alleged crime), the prosecutor decided another interview with Defendant was necessary and arranged for the police to pick him up from SCI where he was serving time on the aforementioned burglary charges. Defendant was

Mirandized and agreed to talk with the officer. The statement that followed was given voluntarily.

The officer conducted the interview while the prosecutor watched on a video monitor in another room. Later, the prosecutor entered the room and directly questioned Defendant, without advising Defendant that he was an attorney, and, more importantly, the prosecutor assigned to the case. While neither the officer nor the prosecutor told the Defendant the purpose of the interview prior to or during the interview, the Defendant stated, after the interview was essentially completed, that the DOC officers told him why the police were coming out to see him- i.e., rape charges.

The State argues that Defendant, by waiving his Fifth Amendment Miranda rights, also waived the Sixth Amendment right to counsel which attached with his indictment. But it also acknowledges that the involvement of its prosecutor in the above interview raises a legitimate concern. Therefore, the State advised the Court that the November 2004 interview would not be introduced in the State's case-in-chief. However, the State steadfastly maintains its intent to use the November 2004 statement for impeachment purposes should Defendant testify at trial.

The defense objects to the State's use of the statement under any circumstances, contending that the constitutional violation by the Deputy Attorney General warrants exclusion in its entirety. The defense requested a ruling as to whether their client's Sixth Amendment rights were violated. If the Court finds that a Sixth Amendment violation did occur, the defense requests an order barring the State from using the November 2004 interview in either their case-in-chief or rebuttal. The defense is entitled to a ruling in order to preserve its best case position on appeal, in the event Defendant is convicted.

Defendant's indictment on the rape charges signaled the initiation of adversarial proceedings against him, and the attachment of his Sixth Amendment right to counsel. Therefore, the question before the Court is whether the Defendant validly waived his right to counsel during the November 2004 interview.

Waiver of Sixth Amendment right in Second Interview

The November 2004 interview implicates Defendant's Sixth Amendment rights in a post-indictment setting. *Patterson v. Illinois,* a 1988 Supreme Court decision addresses the rights of a suspect in a post-indictment interrogation. *Patterson v. Illinois*, 487 U.S. 285 (1988). Before *Patterson,* it was unclear whether the initiation of the adversarial process against a defendant precluded law enforcement from questioning a defendant without the assistance of counsel.

In *Patterson*, a criminal defendant confessed to his involvement in a murder in a post-indictment interview with a state's attorney. *Id*. at 288-89. The defendant later claimed that his Sixth Amendment right to counsel barred the admission of the confession at his criminal trial. *Id*. The Supreme Court disagreed, finding that the "fact that petitioner's Sixth Amendment right came into existence with his indictment, *i.e.*, that he had such a right at the time of his questioning, does not distinguish him from the preindictment interrogatee whose right to counsel is in existence and available for his exercise while he is questioned." *Id*. at 290-91. The Court found that its previous decisions addressed the issue of

> [p]reserving the integrity of an accused's *choice* to communicate with police only through counsel...not barring an accused from making an initial election as to whether he will face the State's officers during questioning with the aid of counsel, or go it alone. If an accused "knowingly and intelligently" pursues the latter course, we see no reason why the uncounseled statements he then makes must be excluded at his trial.

Id. at 291.

The Court held that a post-indictment defendant who has not been appointed counsel or requested the assistance of counsel is not immune from police questioning under Sixth Amendment protections. *Id*.

The *Patterson* Court also held that a post-indictment defendant may validly waive his Sixth Amendment right to counsel under certain circumstances by giving a statement to police following *Miranda* warnings. *Patterson*, 487 U.S. at 292. In *Patterson*, the defendant claimed that waiving the Sixth Amendment right to counsel requires something more than showing that a defendant responded to police questioning after being Mirandized, which effectively waives Fifth Amendment protections. *Id*. The Court disagreed, holding that "an accused who is admonished with the warnings prescribed by this Court in *Miranda*...has been sufficiently apprised of the nature of his Sixth Amendment rights, and of the consequences of abandoning those rights, so that his waiver on the basis will be considered a knowing and intelligent one." *Id*. at 296. Because the defendant was aware of the consequences of talking to the police without an attorney and that any statements he gave could be used against him at trial, the Court found that his waiver was knowing, intelligent and voluntary and the confessions were deemed admissible. *Id*. at 300.

I've located no post-Patterson Delaware Supreme Court cases on this exact issue,[1] but previous Delaware cases suggest that waiver of the Sixth Amendment right to counsel requires more than waiver of one's Fifth Amendment right to counsel. *See Deputy v. State*, 500 A.2d 581,

[1]The fact pattern in *Alston*, a Delaware Supreme Court case which followed *Patterson*, did not require the Court to determine whether a Sixth Amendment violation had in fact occurred. Instead, the court assumed the Sixth Amendment violation and determined that the admission of the evidence was harmless error to the outcome. *Alston*, 554 A. 2d at 309.

590 (Del. 1985). In addition to satisfying Fifth Amendment waiver standards, the State of Delaware must show "some form of affirmative overt action [by the defendant]...which indicated his willingness to talk to law enforcement officers." *Id.* at 591. The burden is on the state to show that the defendant acted affirmatively in intentionally relinquishing a known right to counsel. *Lovett v. State*, 516 A.2d 455, 463 (Del. 1986). The courts will presume that a waiver has not been granted by a defendant and review any purported waivers under a stringent standard.

Delaware courts have previously addressed whether "something more than a mere Miranda warning is necessary to find a valid waiver of the Sixth Amendment right to counsel." *State v. Brophy*, 1986 Del. Super. LEXIS 1396 at *14 (Del. Super. Ct. 1986). In *Brophy*, a defendant charged with first degree murder made inculpatory statements to police officers after his attorney left them alone so that the police could execute a search warrant. *Id.* at *11. Before leaving, the attorney advised the defendant not to speak to the officers without the assistance of counsel. *Id.* But the police officers alleged that during the execution of the search warrant, the defendant began to voluntarily make incriminating statements. *Id.* at *11-12. The defendant made further incriminating statements during another interview, which he initiated by asserting that he wished to make a statement and would not need the assistance of counsel. *Id.* at *13-14. The defendant later requested the suppression of both statements on Sixth Amendment grounds. *Id.* Finding that the Sixth Amendment protections had attached, the Court addressed the necessary components of a Sixth Amendment waiver. *Brophy*, 1986 Del. Super. LEXIS 1396 at *14.

After thoroughly discussing the purpose and importance of a Miranda warning advising a defendant of his constitutional rights, the Court found that

> Miranda warnings are the minimum steps the police must take to assure that the accused is aware of his right to counsel and of the consequences of proceeding without counsel. In determining whether an accused actually made a knowing, intelligent, and valid waiver of his right to counsel, this Court must consider, in addition to police warnings, the totality of the circumstances surrounding the accused's waiver.

Id. at *20-21.

The Court found that the defendant was given Miranda warnings, was aware of his right to counsel and the consequences of waiving that right, and was not coerced or induced into making a statement. *Id*. at *20-21. The Court also found that the defendant "aggressively sought out the police to speak to him outside the presence of counsel and against his counsel's advice." *Id*. at *21. The initiative taken by the defendant in arranging the interview satisfied the overt, affirmative action required by *Deputy*. *Id.*

In *Lovett v. State*, a Defendant's execution of waiver documents provided sufficient affirmative action to demonstrate the defendant's willingness to speak with law enforcement officials. 516 A.2d 455, 465 (Del. 1986). The Court found that the defendant's background, experience and conduct supported a finding that he comprehended his right to counsel. *Id*. at 463. Moreover, the Court relied on the fact that the statement was voluntarily given and that the defendant "spoke of his own accord" absent any coercion by law enforcement. *Id*. at 463-64. Finding that the circumstances of the statement supported the defendant's knowing, intelligent, and voluntary waiver as well as affirmative action indicating the defendant's willingness to speak with law enforcement, the Court allowed the admission of the testimony. *Id*. at 465.

In Delaware, to establish a waiver of one's Sixth Amendment right to counsel, a defendant must demonstrate an affirmative willingness to talk with law enforcement officials.

Id. When weighing the facts and circumstances surrounding an alleged waiver, the Court may consider whether the defendant:

1. Comprehended the nature of the right he forfeited;
2. Indicated, by words or conduct, an affirmative desire to relinquish the right; and
3. Voluntarily relinquished the right.

Deputy v. State, 500 A.2d at 591.

The effectiveness of a waiver must be reviewed in light of all the surrounding circumstances including a defendant's experience, background, and conduct to determine whether he fully comprehended his right to counsel.

The Court must determine whether Mr. Johnson comprehended the nature of the right he forfeited. At the time of his interview, Mr. Johnson was a 47 year old man with an eleventh grade education. He is capable of reading and writing on a basic level.

While there is some dispute concerning the depth of his criminal record, the Court finds that Defendant was Mirandized three times between July 2003 and November 2004. He also had the assistance of counsel regarding his burglary conviction. These prior encounters with the criminal justice system indicate that he fully understood that he had a right to counsel. In both interviews that the Court viewed for this case, Defendant listened to his rights, acknowledged that he understood those rights, and waived those rights. He then made statements to the police.

Mr. Johnson was given Miranda warnings before making the relevant portions of his statement on November 17, 2004. Both the *Lovett* and *Brophy* Courts found that the administration of Miranda warnings was "substantial evidence that the defendant knew of his right to counsel and of the consequences of proceeding with the statement without counsel."

Brophy, 1986 Del. Super. LEXIS 1396, at * 20-21. Mr. Johnson was warned properly as to his right to counsel and the consequences of waiver. The Court finds that Mr. Johnson was fully capable of understanding his right to counsel as explained in the Miranda warnings as they were read to him.

Defense counsel argues that Mr. Johnson was unable to knowingly waive his Sixth Amendment right to counsel because he was unaware that he was speaking to a Deputy Attorney General. The Court admits its concern over the Deputy Attorney General's conduct during the interview. The Court is not concerned about his presence, but rather his failure to inform Defendant of his position or his connection to the case. The defense made an insightful point in contending that the State felt it necessary to have its counsel present during the interview to assist during questioning, but denied Mr. Johnson the same benefit.

Nevertheless, while Mr. Gelof could have been forthright about his actual connection to the case, he did inform Defendant that he was 'sort of related to the investigation.' Therefore, Mr. Johnson was aware that he was speaking with State law enforcement officials. Moreover, the Miranda warnings issued at the beginning of the interview applied throughout, alerting Mr. Johnson to the fact that anything he said to a state agent during the interview could be used against him in a criminal proceeding. He knew he had the right to an attorney and could stop the questioning at any time.

Of significant importance is that the Deputy Attorney General did not elicit any additional information from the Defendant. Defendant made the material admission about having consensual sex with Mrs. Croft before the state's attorney entered the interrogation room. Mr. Gelof was able to expose some inconsistencies in Defendant's story, but he did not expose the

Defendant's initial admission of having sex with Mrs. Croft. The fact that a state attorney's participated in the questioning did not change Mr. Johnson's knowing waiver of his Sixth Amendment right to counsel.

The defense also contends that Mr. Johnson could not knowingly waive his right to counsel without first being informed that he had been indicted on the rape charges, not simply under investigation. There is evidence that Mr. Johnson was aware that he had been indicted on rape charges. He told Detective O'Bier that he asked the guards at the prison why he was being interviewed and they told him it involved the rape charges. However, even assuming his ignorance of an indictment against him, I find that Mr. Johnson was capable of knowingly waiving his right to counsel for the rape of Ms. Croft.

The defense argues that the failure to fully inform Mr. Johnson of the status of his case impaired his ability to make a knowing waiver of his right to counsel. I disagree. While the Supreme Court has not definitively addressed this issue, Delaware courts have found that a defendant does not need to be informed of an indictment to validly waive his Sixth Amendment right to counsel. *Brophy*, 1986 Del. Super. LEXIS 1396 at *20-21. Knowing the exact stage of the rape charges in the system was unnecessary to alert Defendant to the potential need for counsel. Mr. Johnson, fully aware of the consequences, chose to proceed without counsel. All of the evidence before the Court suggests that this election was knowingly made.

Secondly, the Court must also find that Defendant indicated, by words or conduct, an affirmative desire to relinquish his right to counsel. When Detective O'Bier began reading the Miranda warnings, Defendant stated that he was familiar with his rights. After reading the Miranda rights, Detective O'Bier asked Defendant if, after hearing and understanding those

rights, he wished to make a statement. Mr. Johnson responded affirmatively. The interview proceeded and Defendant made the statements that he now seeks to exclude.

Defendant did not hesitate to orally waive his rights when given the Miranda warnings and appeared eager to talk with Detective O'Bier. He was eager to share exculpatory information throughout his statement. At the end of the interview, Defendant willingly executed the waiver forms and freely acknowledged the voluntariness of the statement.

Finally, the Court must determine that the defendant's waiver was voluntarily made. As mentioned before, Mr. Johnson was extremely talkative with Detective O'Bier. He was not hesitant in sharing information about his relationship with Ms. Croft or the events of October 22, 2003. The interview was police initiated, but nothing about the interview appeared to coerce Defendant into talking. Detective O'Bier made no threats or promises in order to coerce Defendant into speaking.

The circumstances of the November 17, 2004 statement indicate that Defendant made a knowing, intelligent and voluntary waiver of his Sixth Amendment right to counsel, therefore the Court has no choice but to allow the admission of the second interview.

Nonetheless, I note that much of the above is mooted by the State's agreement to limit the use of the November 2004 statement. The State agreed not to use the statement in its case-in-chief, but reserved the right to use it in any rebuttal for credibility purposes. I made the above ruling as to Mr. Johnson's Sixth Amendment right because the defense requested a ruling. If I had found that Defendant had not waived his rights, then the voluntary statement would have still come in for impeachment purposes. A violation of a Defendant's Fifth or Sixth Amendment right to counsel does not result in the complete exclusion of a prior inconsistent statement.

Generally, constitutional violations warrant the exclusion of illegal evidence in the state's case-in-chief. However, courts have been hesitant to prohibit the same evidence from being used by the state in rebuttal for impeachment purposes. In *Harris v. New York*, the Supreme Court permitted evidence obtained in violation of a defendant's constitutional rights to be admitted for impeachment purposes in a criminal trial. 401 U.S. 222, 226 (1971). Finding that the defendant had a choice to testify or not, the Court ruled that "[t]he shield provided by Miranda cannot be perverted into a license to use perjury by way of defense, free from the risk of confrontation with prior inconsistent utterances." *Id. at* 226. The Supreme Court later reiterated this sentiment in *Michigan v. Harvey,* finding that "we have consistently rejected arguments that would allow a defendant to 'turn the illegal method by which evidence in the Government's possession was obtained to his own advantage, and provide him with a shield against contradiction of his untruths." 494 U.S. 344*,* (1990) *quoting Harris v. New York,* 401 U.S. at 224.

Likewise, the Delaware Supreme Court has refused to allow defendants to manipulate their constitutional protections into a permit to possibly perjure. In *Foraker v. State*, the Supreme Court denied a defendant's argument that his constitutional rights were infringed when certain statements he made, which were excluded in the state's case-in-chief, were admitted for impeachment purposes. 394 A.2d 208, 212 (Del. 1978). Citing all the reasons stated in *Harris*, the Court held that as long as excluded evidence met the standards of legal trustworthiness, it could be admitted for impeachment purposes. *See id.* at 212-13.

In a more recent case, *Doran v. State*, the Supreme Court admitted a statement excluded from the state's case-in-chief after the defendant took the stand and testified inconsistently with the excluded statement. 606 A.2d 743, 747 (Del. 1992). The defendant elected to testify,

knowing that the state's evidence included a prior inconsistent statement by him. *Id.* The Court found that the defendant had an obligation to testify truthfully. *Id*. To prevent the defendant from possibly perjuring without penalty, the Court ruled that evidence which contradicted his inconsistent testimony, despite its being illegally obtained, was admissible for his impeachment. *Id*. The Court found that the defendant was "precluded from using the trial judge's earlier ruling, which had excluded the statement from evidence, 'to provide himself with a shield against contradiction of his untruths.'" *Doran*, 606 A.2d at 747 *quoting Walder v. United States*, 347 U.S. 62, 65 (1954).

If Defendant chooses to testify, then the voluntary statements he made to the police are admissible for impeachment purposes, pursuant to the State's stipulated position.

Very truly yours,

T. Henley Graves

oc: Prothonotary